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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2000

BRUCE M. FREY Petitioner, vs. UNITED STATES OF AMERICA, Respondent	) On Petition for a writ of) Certiorari to the United) States Court of Appeals) for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's interpretation of the Hobbs Act, 18 U.S.C. § 1951, affirming Frey's conviction of extortion eliminating required elements of the offense is in conflict with the decisions of other circuits and renders the Act unconstitutional as applied?

PARTIES TO THE PROCEEDING BELOW

The caption of the case contains the names of all the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Supreme Court Rule 29.6 is inapplicable because Petitioner Bruce M. Frey is an individual.

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OPINIONS BELOW

The unpublished opinions of the United States Court of Appeals for the Seventh Circuit appears in the Appendix to this Petition for a Writ of Certiorari. The district court's Memorandum of Decision and Order of November 26, 1997, also appears in the Appendix to this Petition, as does the district court's Memorandum of Decision and Order of August 26, 1999. The district court orders have not been published.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered a judgment affirming Frey's conviction and sentence on March 1, 2001. Pursuant to 28 U.S.C. § 1254 (1), this Court has jurisdiction to review the judgment of the Seventh Circuit on a writ of certiorari.

RELEVANT STATUTORY PROVISIONS

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part that:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires to do so (commits an offense under this title).
> (b) As used in this section –
> (c) The term "extortion" means the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

On January 22, 1997, Frey was indicted on one count of attempted extortion. The indictment alleged that Frey, a private attorney, attempted to obtain property by the wrongful use of actual or threatened fear, specifically fear of economic harm by stating to the victim, Hubbard, that, for a fee, Frey or his accomplice could arrange to have felony charges pending against Hubbard in state court

reduced to misdemeanor charges, thereby allowing the victim to retain his federal firearms license.

Frey filed his Motion To Dismiss, arguing that Hubbard's economic loss was failure to gain a favorable plea agreement from the local prosecutor's office on his pending felony charges, showing on the face of the indictment that the victim was seeking a favor, rather than fearing that Frey could or would harm him by sabotaging his ability to get a plea agreement. The Court denied the Motion To Dismiss by order dated November 26, 1997, stating that the issue was for the trier of fact. Frey was convicted at trial, in the course of which he filed a Motion For Judgment of Acquittal, raising the sufficiency of evidence to prove an extortion by means of fear of economic harm, that Hubbard was never in fear of being shaken down, but was under the impression he was "buying justice" in the form of a more favorable plea agreement, and, secondly, that any existing fear of economic harm was not reasonable on Hubbard's part, in that there was no evidence offered to show that Frey could do anything to make his situation

worse. The Court denied Frey's Motion For Judgment of Acquittal by order dated August 26, 1999, concluding that Hubbard's objective was avoidance of ruinous economic harm, rather than seeking economic advantage, distinguished from Second Circuit cases cited by Frey in support of his motion. The Court further concluded that there is no requirement in the Seventh Circuit that a defendant have the power to harm the victim economically, or that the victim reasonably fear that the extortioner may cause economic harm.

Frey appealed the denial of his Motion To Dismiss and Motion For Judgment of Acquittal to the United States Court of Appeals for the Seventh Circuit. On March 1, 2001, the Seventh Circuit denied Frey's appeal and affirmed his conviction and sentence.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

ARGUMENT

I. Introduction

The government has never introduced evidence to prove or argument in support of the proposition that Frey attempted to obtain property by inducing actual or threatened fear of economic harm or that Hubbard reasonably feared Frey's actions. The circuit court's interpretation of the Hobbs Act in sustaining the conviction eliminates the requirements that proscribed conduct on the part of private individuals must include: (a) threat or coercion by the extortioner, and ((b) reasonable fear on the part of the victim that the extortioner has the ability to cause economic harm is neither expressed or implied in the language of 18 U.S.C. § 1951. The rule of lenity requires avoidance of this harsher interpretation and

the substantial overbreadth which would result from the harsher and broader interpretation.

II. The circuit courts have interpreted the Hobbs Act in fundamentally different ways.

The Seventh Circuit has defined fear of economic harm as fear that "... may consist of a state of anxious concern, alarm or apprehension of anticipated harm to a business or of a threatened economic loss." United States v. Arambasich, 597 F.2d 609, 612 (7th Cir. 1979). The victim must also reasonably fear the defendant's extortionate means. United States v. Granados, 142 F.3d 1016, 1020 (7th Cir. 1998).

In affirming Frey's conviction, the Court observes that in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be created by the extortioner, citing United States v. Lisinski, 728 F.2d 887, 891 (7th Cir. 1984). The Court further states that the victim's fear can be pre-existing and the extortioner need only exploit that fear. United States v. Knox, 68

F.3d 990, 996 (7th Cir. 1995). However, Lisinski was acquitted of one count of extortion where the victim was seeking gain and not avoidance of loss in obtaining a liquor license. Lisinski, 728 F.2d at 891. The Court observed:

> "although no threat is necessary for the wrongful use of fear, by the very nature of extortion cases, threats – particularly 'implied threats' will almost always be present. The implied threat will usually be that, unless the victim cooperates with the extortionist, economic loss will result. The extortionist need not be responsible for the situation in which the victim finds himself; what matters most are the circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of economic loss reasonable." Id.

In Knox, the Court concluded that the victim's fear was reasonable because:

a. The victim knew the defendant had hired two bill collectors to collect the debt owed to the defendant;

b. The collectors intimidated the victim by shaking their fists at him, watching his house and following him; and

c. The defendant told the victim that he could not control

the actions of the collectors he hired, unless the victim paid his debt. Knox, 68 F.2d at 996.

United States v. Capo, 817 F.2d 947 (2nd Cir. 1987) and United States v. Garcia, 907 F.2d 380 (2nd Cir. 1990) are in conflict with the Seventh Circuit's interpretation of reasonable fear of economic harm. In Capo, the defendants were involved in a job-selling scheme at a large manufacturing plant, accepting gifts and cash payments in return for hiring certain people. The Second Circuit held that the actions of the defendants did not constitute extortion since the victims were not induced to pay money by wrongful use of fear of economic harm, such as fear of losing the job they already had. Rather, they voluntarily paid the defendants in order to improve their chances to obtain jobs they were unable to obtain simply by applying. Capo, 817 F.2d at 953. The striking similarity to seeking a better plea agreement is obvious. The Second Circuit noted that if they were to find that "any defendant asked for the payment of money as a precondition to using his

influence, that alone was not extortion." Capo, 817 F.2d at 951. To find the defendant guilty, you must also find that "the victim reasonably believed that the defendant had the power to influence the official to hurt the victim's prospects and that the victim was in fear that the defendant would exploit that power to the victim's detriment." Id. (Emphasis added.)

In Garcia, U.S. Congressman Garcia received payments for his assistance in government contract procurement and was charged with extortion. The Second Circuit held that this did not constitute a threat of economic harm by Garcia. The Court noted that the victim company's officials testified that they made payments to Garcia because they feared if they did not, they would not get the preferential treatment they would need to win the government contracts in question. Garcia, 907 F.2d at 383. The Second Circuit noted:

> "This is not the mind set of a victim of extortion rather it is the thinking of a shrewd unethical businessman who senses and seeks to capitalize on a money-making opportunity .... By paying the Garcia's, Wedtech (the victim) was purchasing an advocate, not buying off a thug." Garcia, 907 F.2d at 383-384.

The Fifth Circuit decisions also require the victim fear a loss and has held that fear of losing a potential gain will not support a Hobbs Act violation. United States v. Tomblin, 46 F.3d 1369, 1384 (5th Cir. 1995) The Eleventh Circuit has adopted a similar interpretation requiring reasonable fear of economic harm to support an extortion conviction in United States v. Livingston, 665 F.2d 1003 (11th Cir. 1982) Livingston had attempted to obtain $200,000.00 from a company in exchange for information about embezzlement taking place within its own organization. The Court noted in setting aside the extortion conviction that in order to be guilty of wrongful use of fear, the party must cause or threaten to cause the economic loss to occur. The Court stated, "offering to sell information concerning an embezzlement, without any control over the embezzlement and without threatening to cause the embezzlement to continue, may be morally repugnant but it doesn't' constitute extortion." Livingston, 665 F.2d at 1005.

The Seventh Circuit specifically rejected Frey's assertion that it has adopted a more narrow construction followed the

Second Circuit case, Capo, cited with approval in Sutherland v. O'Malley, 882 F.2d 1196, 1202 (7th Cir. 1989). This acknowledgedly broader interpretation of the Hobbs Act, as it is followed in this circuit, eliminates the nexus between conduct on the part of the alleged extortioner and the requisite fearful state of mind of the victim. Once this nexus is eliminated, the additional requirement of reasonableness of the victim's fear of economic loss loses its relevance as well. It further ignores any distinction between reasonable fear of economic loss and fear of losing potential gain, which is not supported by any other Seventh Circuit case: Lisinski was acquitted on the count where the victim was seeking economic gain. Lisinski, 728 F.2d at 891.

Frey's conviction is in conflict with the circuit's earlier decisions, as well as the narrower interpretations of the Hobbs Act as followed in other circuits cited herein. It cannot be reconciled with the earlier statement in Sutherland v. O'Malley, 882 F.2d 1196, 1202 (7th Cir. 1989):

"... there is no evidence that O'Malley either intended to put her (the victim) in fear or that her fear was reasonable." Id.

"... in order to prove extortion by fear of economic loss, 'the proof need establish that the victim reasonably believed: first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment.' We agree." Id., citing Capo, 817 F.2d 947, 951.

The Seventh Circuit decisions prior to Frey consistently required either a nexus between the conduct of the defendant and the resulting state of mind of the victim, i.e., threat (express or implied) which provides the basis for a determination of the reasonableness of fear generated on the part of the victim, or acting under color of official right in the absence of the requirement of actual threat as inducement. Another example of application of this standard is illustrated in U.S. v. Rahman, 34 F. 3d 1331 (7th Cir. 1994) in which the circuit court found insufficient evidence to support conviction of attempted extortion where evidence failed to show that the defendant intended to threaten the victim.

The government continues to seek expanded application of

Hobbs Act, based on the broad interpretation applied in the Seventh Circuit, concluding that an express or subtle extortionate demand is not a prerequisite where the defendant is exploiting pre-existing fear of economic harm. One such case is particularly worthy of comparison. In U.S. v. Ruedlinger, the defendant was charged with attempted extortion by attempting to induce payment from schools through threatened fear of economic harm, circulating a letter informing the schools that their existing insurance coverage was inadequate and that only the defendant offered coverage that could provide protection from possible lawsuits by third persons. The issue was whether there was a requirement that the person threatening the economic harm must also be the one who would cause it. The letter contained no threat that the defendant would do anything if the school districts did not purchase the alternative insurance offered by defendant, only that use of the inferior insurance could result in lawsuits by third parties. The government argued that the defendant was exploiting

the school's fear of economic harm, and that, therefore, no express or subtle extortionate demand or threat was necessary. The Court responded:

"The court believes that the government's argument misses the point. There is little question that the fear necessary for an extortion charge need not be the product of the defendant's action. (Citation omitted) Moreover, the law is settled that a defendant's threat need not be express. (Citation omitted) Boylan, the case cited by the government, makes both of these points. The court believes, however, that there is a missing element here. We believe an extortion charge requires that the defendant must have the power to hurt the victim in economic terms or the victim must believe that the defendant has the power to hurt him in economic terms. See Valenzeno, 123 F.3d at 369; United States v. Capo, 817 F.2d 947, 951 (2nd Cir. 1987). This concept is so well understood that few cases discuss it. (Emphasis added.) This is the element missing from the charges contained in Counts 20 and 21. The defendants may have sought to both create and exploit an economic fear, but there is no indication that the defendants had the power to carry out the threat." U.S. v. Ruedlinger, 990 F.Supp. 1295, 1301-1302 (D. Kan. 1997).

"The defendants neither suggested nor indicated that they could do anything to the school districts if they did not purchase the alternative insurance. Moreover, the circumstances surrounding these letters suggest that it would be unreasonable for the school districts to believe that the defendants had any power to hurt them in economic terms." Id. at 1302.

"The threat by the defendants here concerned actions that might be taken by others who the defendants had no control over. The defendants made no threat that they would cause the school

districts any economic loss. We believe that such a threat is the essence of extortion and the reason that these counts must fail: Id. at 1302.

The factual scenario in Ruedlinger parallels the facts in Frey's case and the court's analysis and conclusions are in harmony with Seventh Circuit's decisions prior to Frey and the decisions of the other circuits cited herein by comparison and historical analysis.

III. Clarification of the Hobbs Act is necessary.

Extortionate acts by private individuals must include threat of economic loss and reasonable fear of loss from defendant's actions. The Hobbs Act contains no definition of the term fear. As shown, that term has received various interpretations in the circuit courts. Neither does the Act contain a definition of the term "under color of official right". This Court in Evans provided an analysis of the legislative history of the Hobbs Act as an aid to resolving conflicts in the circuits resulting from ambiguities in the statute as to elements of extortion "under color of official right".

In the resulting decision, this Court determined that the word "induced" is a part of the definition of the offense by the private individual, but not the offense by the public official. Evans v. United States, 504 U.S. 255, 265 (1992). At common law, extortion was an offense committed by a public official who took "by color of his office" money that was not due to him for the performance of his official duties. A demand, or request, by the public official was not an element of the offense. Evans, 504 U.S. 255, 260. Congress has unquestionably expanded the common law definition of extortion to include acts by private individual, pursuant to which property is obtained by means of force, fear, or threats. Id.

There is no common law interpretation of the statutory text pertaining to extortion by private individuals. Threat is an element of extortion by individuals because the coercive element provided by public office under color of official right offenses is lacking. "The coercive nature of the official office provides all the

inducement necessary" Evans, 504 U.S. at 258. The Court reviewed the legislative history of the statute in Evans, concluding that the terms robbery and extortion were historically based on definitions under New York Law:

> "The legislative history is sparse and unilluminating with respect to the offense of extortion. There is a reference to the fact that the terms 'robbery and extortion' had been construed many times by the courts, and to the fact that the definitions of those terms were 'based on the New York law' 89 Cong. Rec. 3227 (1943) (statement of Rep. Hobbs); see 91 Cong. Rec. 11906 (1945) (statement of Rep. Robison). In view of the fact that the New York statute applied to a public officer 'who asks, or receives, or agrees to receive' unauthorized compensation, N.Y. Penal Code 557 (1881), the reference to New York law is consistent with an intent to apply the common law definition." Evans, 504 U.S. at 264.

It would, therefore, be consistent with the legislative intent which accompanied the Hobbs Act, and the rules of statutory construction, to conclude that terms "fear" and "threat" should be construed according to their historic definitions under New York law also. Lindgren, frequently quoted in the footnotes in the majority opinion in Evans, provides the information needed to support this interpretation:

"The text of the Hobbs Act is not clear, and those who pretend that it is are merely making the analysis of its meaning more difficult. It prohibits extortion of two types—coercive extortion ('by wrongful use of actual or threatened force, violence, or fear') and something that looks like the core of common law extortion ('under color of official right'). Although the meanings of 'force' and 'violence' are reasonably plain, the meaning of 'fear' is vague. Courts usually fill in its content by adopting the meaning given to the word in state extortion statutes. Unlike most other statutes based on the commissioners of the code, [proposed] Penal Code of the State of New York (1865) (the 1864 draft code for New York), (Citation omitted.), however, the Hobbs Act does not contain a provision that defines fear. The Field Code and New York Penal Code of 1881 defines 'fear' in a section that provided:

Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property...; or,
2. To accuse... of any crime; or,
3. To expose, or impute... any deformity or disgrace; or,
4. To expose any secret...(N.Y. Penal Code, § 553 (1881)"

Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 834 (1988) (hereinafter Lindgren). Under this analysis, the requirement of a nexus between an extortionate threat or coercive act on the part of the requirement of a nexus between an

extortionate threat or coercive act on the part of the extortioner and a resulting reasonable fear on the part of the victim of economic harm becomes clear. The broader interpretation advanced by the Government would allow unlimited expansion of federal jurisdiction on a case by case basis. Lindgren observes:

"Fear is present in many valid economic transactions. A bank may use the fear of foreclosure to collect on a delinquent loan, even where foreclosing may destroy someone's farm, business, or way of life. An injured potential plaintiff may use the fear of losing his job unless he comes to work on time. An employer may put a worker in fear of losing his job unless he comes to work on time. Thus the vague term 'fear' is usually read, not according to its lay conception, but as a term of art, according to its typical meaning in extortion or blackmail statues—in particular, those statues based on the Field Code". Lindgren, pg. 835. (Internal citations omitted.)

The applicability of the statute to the facts in this case is, at best, ambiguous, and more likely, historically inapplicable.

"The Court has often stated that, when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. (Citations omitted.) Because the Court's expansive interpretation of the statute is not the only plausible one, the rule of lenity compels adoption of the narrower interpretation. That rule, as we have explained on many occasions, serves two vitally important functions:

> 'First, a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures, and not courts, should define criminal activity.'" Evans, 504 U.S. at 289, (Dissenting opinion, citing United States v. Bass, 404 U.S. 336, 348 (1971) (citations omitted; footnote omitted.)

The Government's expanded version of the Hobbs Act would also result in prosecution of a multitude of state offenses as federal felonies at the pleasure of federal prosecutors in the absence of any plain statement of Congressional intent within the language of the statute. The requirements under this plain statement rule dictate a narrow construction to federal legislation defining criminal conduct already covered under state criminal statutes. United States v. Bass, 404 U.S. 336, 349, 30 L.Ed. 2d 488, 92 S.Ct. 515 (1971).

Review of the legislative history of the Hobbs Act by the Supreme Court in Evans revealed no Congressional intent to

expand the meaning of extortion by private individuals beyond the threats of fear enumerated in the Field Code and the New York Penal Code of 1881. The mandate of the plain statement rule as applied to the Hobbs Act is clear. A similar analysis of legislative intent surrounding the Travel Act in Rewis led the Supreme Court to decline to accept an expansive interpretation under the plain statement rule:

"...we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act 18 U.S.C § 1952 would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors. But the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of § 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056 (1971), citing Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

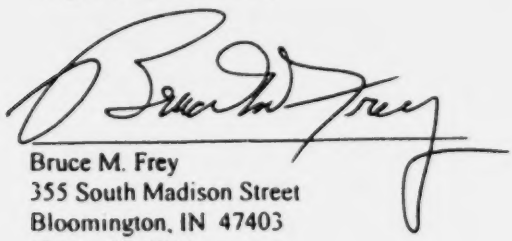
CONCLUSIONS

There is insufficient evidence to find Frey guilty of a violation of 18 U.S.C. § 1951. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. The Government failed to prove that Frey attempted to obtain property by wrongfully inducing actual or threatened fear of economic harm. The Government also failed to prove that the victim reasonably feared the acts of the defendant. The evidence at trial clearly proved that the victim did not fear Frey or the results of his actions. Because the Government offered no evidence of inducement or threat of economic harm to the victim, and no reasonable fear on the part of the victim, the evidence does not prove beyond a reasonable doubt that Frey committed acts which amounted to extortion.

The construction of the Hobbs Act necessary to sustain the conviction would render the statute unconstitutional as applied to this case. The construction of the statute which eliminates the

requirements that proscribed conduct on the part of private individuals must include: (a) threat or coercion by the extortioner, and (b) reasonable fear on the part of the victim that the extortioner has the ability to cause economic harm is neither expressed nor implied in the language of 18 U.S.C. § 1951. The rule of lenity requires avoidance of this harsher interpretation. For the reasons discussed above, clarification of the Hobbs Act is necessary and Frey's conviction should be reversed.

Respectfully submitted,



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APPENDIX

1. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 1, 2001.....1
2. MEMORANDUM OF DECISION AND ORDER OF THE COURT DATED NOVEMEBER 26, 1997.....
3. MEMORANDUM OF DECISION AND ORDER OF THE COURT DATED AUGUST 26, 1999.....

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 22, 2001*
Decided March 1, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. RICHARD D. CUDAHY, *Circuit Judge*

Hon. RICHARD A POSNER, *Circuit Judge*

No. 00-1579

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRUCE M. FREY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

No. 1:97-CR-4

William C. Lee,
Chief Judge.

ORDER

A jury found Indiana attorney Bruce Frey guilty of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, based on a scheme in which he and Thomas Hubbard convinced James Lambert – a firearms dealer facing felony charges – to pay them to "buy" a plea bargain that would allow Lambert to avoid felony convictions and thereby continue to run his firearms business. Frey appeals, and we affirm.

James Lambert and his wife jointly owned and operated a hunting and fishing equipment store in Grant County, Indiana, using a federal firearms dealer's license issued in both their names. The mainstay of their business was firearms sales, and Lambert handled these himself because his wife knew very little about firearms. Lambert's wife called police to their home in January 1994 when Lambert attempted suicide, and Lambert was arrested after struggling with police officers over a gun. The officers found drugs on Lambert, and he later was charged with four felonies: two counts of criminal recklessness and two counts of possessing a controlled substance.

In February or March 1995, shortly after his release from jail pending trial, Lambert spotted Bruce Frey, whom he knew to be an attorney, shopping at Lambert's store. Although Lambert was counseled at that point, the best plea offer his retained attorney had been able to secure would have required Lambert to plead to a felony, which Lambert knew would affect his ability to operate his business. *See* 18 U.S.C. §§ 922(a)(1) (prohibiting dealing in

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

firearms without a license), 922(g)(1) (prohibiting possession of firearm by convicted felon), 923(d)(1) (prohibiting issuance of dealer's license to companies controlled, directly or indirectly, by convicted felons). *See also Casanova Guns, Inc. v. Connally*, 454 F.2d 1320 (7th Cir. 1972) (per curiam) (affirming denial of dealer's license to newly formed corporation based on its relationship with exiting corporation that had pleaded guilty to felony charge; corporations had unity of interest between officers and shareholders and closely integrated business operations, and assets of new corporation consisted solely of firearms inventory purchased from exiting corporation). Lambert asked Frey to help with his case, and Frey returned to the store several days later saying he had "checked in" with the prosecutor's office and would be able to "do something" about the charges. Local prosecutors, Frey told Lambert, believed Lambert had escaped prosecution for a number of past crimes, and accordingly demanded $20,000 in exchange for a favorable disposition of the pending charges. Frey stressed to Lambert "over and over" the importance of avoiding felony convictions, saying "you don't want to lose your license; you've got too much to lose." Frey also said that he did not want to be "visible," so the two would use a mutual acquaintance, Thomas Hubbard, as a go-between to "handle the details." Frey further advised Lambert not to sign any plea agreement without Frey's approval and not to tell his attorney of record, David Payne, about Frey's involvement.

Months later, in early December 1994, Lambert told Payne about Frey's offer. Payne contacted the Indiana State Police and arranged for Lambert to cooperate in an investigation into public corruption by recording all his conversations with Frey and Hubbard. Under the direction of the police, Lambert met and spoke with Frey and Hubbard several times throughout the following months, making a series of payments totaling $20,000. Police then recruited Frey to help with the investigation, but Frey was uncooperative and no link between either him or Hubbard and the prosecutor's office was ever established. Meanwhile, the

deputy prosecutor reevaluated his case against Lambert. Lambert eventually entered a misdemeanor plea agreement (unaided by Frey and Hubbard), and Frey and Hubbard were charged with attempted extortion. Hubbard pleaded guilty, and a jury convicted Frey after hearing tapes of his and Hubbard's conversations with Lambert.

Frey's arguments on appeal, though framed as both sufficiency-of-the-evidence and constitutional challenges, boil down to a contention that this court has incorrectly interpreted the Hobbs Act. Frey insists, relying on cases from other circuits, that the Act requires that the victim fear a harm caused directly by the extortioner. He goes on to assert that because he never "threatened" Lambert and because Lambert lacked independent corroboration of Frey's purported ties to the prosecutor's office, any fear Lambert had of Frey was unreasonable. In Frey's view, Lambert behaved more like a shrewd opportunist than an extortion victim. Our cases make clear, however, that in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be created by the extortioner. *See United States v. Lisinski*, 728 F.2d 887, 891 (7th Cir. 1984). The victim's fear can be preexisting, *id.* at 890-92; the extortioner need only exploit that fear, *id.*; *United States v. Knox*, 68 F.3d 990, 996 (7th Cir. 1995). To the extent that Frey believes the Second Circuit has interpreted the Act more narrowly, we are unpersuaded by his suggestion that we adopted that court's view when we summarized its holding in *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987) (en banc), in a parenthetical within our own opinion in *Sutherland v. O'Malley*, 882 F.2d 1196, 1202 (7th Cir. 1989). *Sutherland* in no way endorses Frey's contention that the extortioner must cause his victim's fear of economic harm; indeed *Sutherland* cites approvingly to *Lisinski*, in which we stated that "it is unnecessary for the government to prove that [the extortioner] actually created the fear in the minds of his victims." *See id.; Lisinski*, 728 F.2d at 891.

Here, there was sufficient evidence for a reasonable jury to find the required elements beyond a reasonable doubt. Lambert's testimony that at the time of his arrest he was "extremely" aware of the impact a felony conviction would have on his firearms business, and his testimony that "[b]asically, [a felony conviction] would have shut my business down," is sufficient evidence that he reasonably feared economic harm. *See, e.g., Lisinski*, 728 F.2d at 891 (victim's fear that loss of liquor license would put his restaurant out of business was sufficient to sustain extortion conviction). Lambert's testimony that Frey stressed repeatedly the importance of avoiding such a conviction, in turn, constitutes sufficient evidence that Frey exploited Lambert's fear. *See id.*

Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cause No. 1:97-CR-4
	)	
BRUCE FREY	)	

ORDER

This matter is before the court on the Motion to Dismiss filed by the Defendant, Bruce Frey, on July 15, 1997.[1] After having been granted an extension of time in which to do so, the Government filed a response to the motion on August 14, to which the Defendant filed a reply on August 29. The court then held a hearing on the motions (primarily the motion to dismiss) on October 6. For the following reasons, the Motion to Dismiss was **DENIED.**

STATEMENT OF FACTS

The Government alleges that from late 1994 until early 1996, Defendant Frey attempted to obtain money and property belonging to James Lambert. Indictment, p. 1. At the time, Lambert was facing state felony charges in Grant County, Indiana. *Id.* The Government claims Frey and an accomplice convinced Lambert that for a fee of $20,000.00 they could arrange to have Lambert's felony charges reduced to misdemeanor charges, which in turn would permit Lambert to retain a federal firearms license. *Id.* The Government maintains that Frey "did attempt to obtain the property of James Lambert with his consent being induced by the wrongful use of actual and threatened fear, specifically fear of economic harm..." and that these acts constituted a violation of the Hobbs Act, i.e., extortion. *Id.* Frey, appearing before Magistrate Judge Roger B. Cosbey, pleaded not guilty to the charge on February 4, 1997. Record at 10.

DISCUSSION

On January 22, 1997, Bruce Frey was charged by way of an indictment with extortion, in violation of 18 U.S.C. § 1951. The Government alleges that Frey attempted to obtain property from James Lambert through the use of actual or threatened fear of economic harm. In his motion to dismiss, Frey argues that the indictment naming him is so vague and confusing that it is fatally flawed, and does not establish a violation of 18 U.S.C. § 1951 (the "Hobbs Act").

With regard to the contents of an indictment, the Federal Rules of Criminal Procedure provide, in relevant part that "[t]he indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P.7(c)(1). The U.S. Supreme Court "has

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[1] Frey also filed several other motions in this case. As the court explained during a status conference held on September 11 after briefing of the motions was completed, the court determined that it would rule on the motion to dismiss first and consider the other motions separately.

instructed that an indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and enables him to enter a plea without fear of double jeopardy." *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). As stated, the indictment in the present case charges a violation of the Hobbs Act. The Defendant and the Government agree that the elements of a Hobbs Act violation are as follows:

> First, the defendant knowingly and willfully obtained property from [another] person...;
>
> Second, the defendant did so by means of .... Extortion;
>
> Third, the defendant knew that the person ... parted with property of the ...extortion; and,
>
> Fourth, the....extortion affected commerce.

Federal Criminal Jury Instructions of the Seventh Circuit, Vol. III, p. 66 (1986). Frey argues that "Rule 7(c)(1) has been interpreted

to require that every element of an offense be stated and that the defendant be given fair notice of the charge against him so that he may prepare his defense..." Defendant's Memorandum in support of Motion to Dismiss ("Defendant's Memorandum"), p. 1 (citations omitted). Frey then argues that because the indictment in the present case does not contain the words "knowingly and willfully," it fails to set forth the first and third elements of a Hobbs Act violation. He also maintains that since the indictment does not state on its face that Frey knew Lambert was parting with property because of the alleged extortion, it fails to set forth the third element of the violation. The Government argues that "[t]he issue of whether an Indictment alleges every element of the offense is to be reviewed from a common sense viewpoint rather than one of hyper-technicality." Government's Opposition to the Defendant's Motion to ismiss ("Government's Response"), p. 2 (citing *United States v. Purvis*, 580 F.2d 853, 857-58 (5th Cir. 1978)). In *Purvis*, the defendants were charged with conspiring to

deprive another person of his civil rights, in violation of 18 U.S.C. § 241. The indictment failed to use terms such as "knowingly," "intentionally," or "willfully". Holding that the indictment failed to contain legal terms alleging specific intent, the district court granted the defendants' motion to dismiss. The Fifth Circuit reversed holding that "[t] he validity of an indictment is determined from reading the indictment as a whole and ... must be determined by practical, not technical, considerations."' *Purvis*, 580 F.2d at 856 (quoting *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976)). The court further explained that "[a]lthough indictments must be specific and precise as to the acts and crime charged, the law does not compel a ritual of words." *Id.* at 857. After examining the indictment at issue, the Fifth Circuit stated that "[t]aken as a whole, the facts set forth in the indictment here sufficiently allege an intent by defendants..." *Id.* The court held that such was the case despite the fact that the indictment did not contain "the words 'knowing,' and 'willful' or 'intentional,' or any

of their derivations." *Id.* at 858. The Government also argues that "[w]here intent is required, the Indictment need not contain formal words such as 'knowingly,' or 'willfully,' it is sufficient if the words and facts of the Indictment infer or imply the requisite intent." Government's Response, p. 2 (citations omitted). The Government, at page two of its Response, also cites other cases dealing with this issue. These include *United States v. McLennan*, 672 F.2d 239 (1st Cir. 1982) (words or facts contained in indictment fairly implied guilty knowledge) and *Walker v. United States*, 439 F.2d 1114 (6th Cir. 1971) (words in indictment implied required intent for bank robbery charge). The court further notes that, notwithstanding the elements of a Hobbs Act violation as set forth in the Seventh Circuit jury instructions, the words knowingly, willfully, or intentionally do not appear anywhere in 18 U.S.C. § 1951. The statute defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official

right." 18 U.S.C. § 1951 (b)(2). Thus, as the case law instructs, this court must examine the indictment itself to determine whether it complies with Fed.R.Crim.P. 7(c)(1).

In the present case, the indictment states, in its entirety, as follows:

1. At all times material to this Indictment, James Lambert was either directly or indirectly engaged in the business of buying and selling firearms using a federally issued firearms dealer's license held either by James Lambert and/or by James Lambert's wife in interstate commerce and an industry which affects interstate commerce.
2. From on or about December 12, 1994, until on or about January 31, 1996, in Grant County, in the Northern District of Indiana.

BRUCE FREY,

Defendant herein, did unlawfully attempt to obstruct, delay and affect commerce, as that term is defined in 18 U.S.C. § 1951, and the movement of articles, commodities and funds in such commerce, by extortion, as that term is defined in 18 U.S.C. § 1951, in that the defendant FREY did attempt to obtain the property of James Lambert with his consent being induced by the wrongful use of actual and threatened fear, specifically the fear of economic harm, in that the defendant and/or the defendant's accomplice could arrange to have the felony charges pending against Lambert in Grant Superior Court I, Cause #27D01-9401-CF-6, reduced to misdemeanor charges which would allow Lambert to retain his federal firearms license, and on or about the following dates the defendant's accomplice did receive from James Lambert the following sums and goods as payments to achieve this result:

Date	Amount
12-12-94	$7,500.00
12-15-94	$2,500.00
1-19-95	$1,000.00
1-20-95	$3,500.00
1-31-95	truck valued at $1,200.00
2-13-95	shotgun valued at $520.00
2-16-95	$500.00
3-16-95	$500.00
4-17-95	$780.00
1-31-96	$2,000.00

All in violation of 18 U.S.C. § 1951, and 2.

Indictment, Record at 1. As a practical matter, it is difficult to

imagine language in an indictment that would more clearly and obviously imply that the defendant's acts were committed knowingly, willfully, or intentionally, despite the absence of those exact words in the body of the indictment. This indictment is a far cry from one which Frey argues "is so vague and confusing the Defendant cannot do what the Rules proscribe, i.e., understand what he is being accused of and address those issues." Defendant's Memorandum, p. 2. On the contrary, the court finds that the indictment in this case is in fact a "plain, concise and definite written statement of the essential facts constituting the offense charged." It achieves the purpose of Rule 7(c)(1) by containing a clear and detailed factual description of the charge against Frey and the allegations upon which the Government relies to support that charge.[2]

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[2] Frey also argues that the "indictment is vague and confusing" since it refers in the first paragraph to "Lambert and/or Lambert's wife..." Defendant's Memorandum, p. 3. Frey claims that "[i]t is unclear what Lambert's wife's involvement might be in relation to the charge." *Id.* Frey admits in his briefs that a federal firearm dealer's license was held in his name and later transferred to his wife. The Government states that the "allegations concerning ownership of the federal firearm's license are basic

Aside from the technical arguments Frey makes regarding the allegedly facially insufficient nature of the indictment, he claims the indictment "does not allege a plain, concise, and definite statement of the essential facts constituting extortion by the wrongful use of fear of economic harm." Defendant's Reply, p. 9. This argument goes more to the substantive nature of the charges than to the mere technical sufficiency of the indictment. Frey argues that the indictment does not set forth an extortion since "[t]he Indictment on its face shows that the issue was one of obtaining a favor and not a situation where the Defendant or his alleged accomplice tried to instill fear in Lambert..." *Id.*, p. 11. That is to say, instead of acting out of fear of economic harm, Lambert was instead simply attempting to buy a favor from Frey with regard to the state felony charges.

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undisputed facts that will be proved at trial. It is difficult to imagine how these allegations prejudice the defendant. If Lambert paid the money to protect the license, from any possible harm, real or perceived, whether the license was in his wife's name or his name or both their names, then an extortion by the fear of economic harm took place." Government's Response, p. 5. The court agrees that this argument is without merit and that the mere mention of "Lambert's wife" does not render the indictment in this case vague to the point of being legally insufficient. This argument, in short, does not affect the court's analysis set forth above.

In support of this argument, Frey relies primarily on the cases of *United States v. Capo*, 817 F.2d 947, 951 (2nd Cir. 1987) and *United States v. Garcia*, 907 F.2d 380 (2nd Cir. 1990). In *Capo*, the defendants were involved in a "job-selling" scheme at a large manufacturing plant. The defendants, at least two of whom were employed in the plant's Industrial Relations Department and were responsible for hiring thousands of production personnel, accepted gifts and cash payments in return for hiring certain people. The Second Circuit held that the actions of the defendants did not constitute extortion since the victims were not induced to pay money by the wrongful use of fear of economic harm, such as fear of losing a job they already had. Rather, they voluntarily paid the defendants in order to improve their chances to obtain jobs they were unable to obtain simply by applying. *Capo*, 817 F.2d at 953.

In *Garcia*, the defendant was charged with extortion and other crimes arising out of his congressional activities on behalf of a corporation (which was, as the Second Circuit referred to it, "the

now infamous Wedtech Corporation[.]"). For several years after being elected to the U.S. Congress, Garcia had used his political position, legitimately, to help Wedtech receive loans from Government agencies and to obtain a contract to build pontoons for the Navy. Some years later, Garcia and his wife arranged to have dinner with an officer of Wedtech. Wedtech was experiencing some problems with the Navy contract and was also endeavoring to obtain contracts with the U.S. Postal Service. Garcia and his wife informed the Wedtech official that they had influence with high-ranking officials at both the Navy and the Postal Service. The Garcia's then suggested that an arrangement be made whereby Wedtech would make payments which ultimately would end up in the hands of Mrs. Garcia. "Fearing that a denial of payments to [Mrs.] Garcia would induce [Mr.] Garcia to withhold his support for the postal contracts Wedtech sought, the Wedtech officers approved the payments." *Garcia*, 907 F.2d at 383. It was this arrangement that resulted in charges being brought against the Garcias. The Government contended that "Garcia was warning

Wedtech that unless he and his wife were paid, the company could no longer count on Garcia as a congressional advocate." *Id.* However, the Second Circuit held that this did not constitute a "threat of economic harm" by Garcia. The court noted that the Wedtech official, when asked why the payments to the Garcias were approved, testified that it was "[b]ecause I felt that if we were not going to make those payments, the Congressman was not going to do the kind of activity that we would need to have done to convince Postmaster General Bolger to set aside those contracts for Wedtech." *Id.* He further testified that he "felt that if we were not to satisfy those payments, we were not going to receive any activity beneficial to us regarding those postal contracts." *Id.* The Second Circuit reversed the Garcia's convictions on the extortion charges, reasoning that the evidence did not establish that the victim, Wedtech, was in fear of economic harm. Regarding the Wedtech officer's testimony, the court wrote as follows:

> This is not the mindset of a victim of economic extortion; rather, it is the thinking of a shrewd, unethical businessman who senses and seeks to capitalize on a money-making opportunity. The central fact is clear: even in the face of Garcia's disgraceful

request for money, Wedtech was not risking the loss of anything to which it was legally entitled. Wedtech would still be permitted to bid on government contracts. But without Garcia's favorable attitude, the company might not be able to count on continued preferential treatment, nor could it secure Garcia's favorable intervention in the future. Garcia, in turn, was in effect offering to sell his congressional power, but he was not using that power as a way to intimidate Wedtech, By paying the Garcia's Wedtech was purchasing an advocate, no buying off a thug.

Id. At 383-84. In the present case, Frey argues that his situation with Lambert is analogous to the situation in *Garcia*. Frey claims that he did not create any fear of economic harm that Lambert may have experienced and that in making the payments Lambert was merely "purchasing an advocate" in much the same manner that Wedtech did.

Frey distinguishes the situations in the *Capo* and *Garcia* from cases where the courts found that a victim of extortion did in fact part with property out of fear of economic harm. In attempting to make this distinction, Frey discusses primarily the cases of *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992) and *United States v. Stodola*, 953 F.2d 266 (7th Cir. 1992). In *Crockett*, the victim, Herbert Panice, who operated an

establishment known as the Show Club (in reality a house of prostitution), approached one of the defendants, Albert Tocco. Panice knew Mr. Tocco "by reputation as the boss of Chicago Heights" and thought that Tocco could help Panice obtain a liquor license. Several months after he obtained the liquor license, Panice was approached by Tocco who "announced that he and Panice were now partners and that Panice would have to pay him $4,000 a month." *Crockett*, 979 F.2d at 1207. Panice testified that "Mr. Tocco never threatened him, that he was never in fear of Mr. Tocco, and that he understood that the purpose of the payments was to 'help keep my license,' or to 'protect my license.'" *Id.* In his defense, Tocco argued "that Panice's testimony shows merely that Panice compensated Mr. Tocco for his help in obtaining and maintaining a liquor license; he emphasizes Panice testified that he never was afraid of Mr. Tocco, that Mr. Tocco never threatened him, and that no one, including Mr. Tocco, ever told him that his license would not be renewed if he did not pay Mr. Tocco." *Id.* at 1212. Thus, argued Tocco, there

was no wrongful use of fear of economic loss to sustain a conviction for extortion.

The Seventh Circuit rejected Tocco's argument that since Panice had "no legal entitlement to a liquor license" the situation was "analogous to *Garcia*." *Id.* at 1212-13. The Seventh Circuit rejected Tocco's argument that there was no wrongful use of economic fear and held that the circumstances in *Crockett* "fall squarely under *Lisinski*." *Id.* at 1213. The Seventh Circuit distinguished *Crokett* from *Garcia* in the following manner:

> In *Lisinski*, the owner of a restaurant, who was in jeopardy of losing his liquor license because of a large Illinois sales tax liability, asked the defendant for help. The defendant, who worked for the Clerk of the Circuit Court of Cook County and had friends in the Illinois Liquor Control Commission, had the license "unblocked." A few days later he asked the restaurant owner for a thousand dollars to "take care of some people." The following year, shortly before the liquor license was due to expire, the defendant called and asked for another payoff. We upheld the jury's verdict on the ground that this second payoff had been induced through the restaurant owner's fear of economic loss, which the defendant had exploited... In the present case, Panice testified that, some months after Mr. Tocco helped him get the license, he and Mr. Tocco had a

> conversation in Panice's office at Show Club. Mr. Tocco, he testified, "kind of had a smile on his face. He says, 'We're partners now, and its going to cost you four Gs a month.'... Later the payment was raised to $5,000. According to Panice, he made the payments to Mr. Tocco in order "to protect his license".... Thus, there was adequate evidence to permit a rationale trier of fact to find that the payments were induced by fear of economic harm."

Id. Similarly, in *Stodola*, the Seventh Circuit held that the victims, who were contractors, made payments to the defendant, who was a County Commissioner, out of fear of economic harm resulting from their inability to bid on county projects. Stodola, relying on *Garcia*, argued that "extortion was not established under the 'fear of economic' prong of § 1951 (b)(2) because [defendant's] payments to the Commissioners were motivated by hope of illegal financial gain, not fear of economic loss." *Stodola*, 953 F.2d at 271. The Seventh Circuit, however, distinguished *Garcia* and wrote:

> We need not evaluate the holding in *Garcia* because the case is clearly distinguishable. The Second Circuit reversed a conviction on the "fear of economic loss" provision because the evidence "did not establish that the company acted out of fear that without these payments [to a

> congressman] it could lose existing contracts or even opportunities to which it was legally entitled." *Garcia*, 907 F.2d at 385. We have an entirely different situation here. [There was testimony] that the Commissioners did not award contracts through the bidding process required by law, but rather awarded contracts to the companies that paid them the most kickback money. [The victims] testified that they believed that [they] would not get or retain the cleaning contracts if they did not pay the monthly kickbacks. In short, [the victims] would not get the cleaning contract without paying the Commissioners more money than [other companies were] paying. Viewing the evidence in the light most favorable to the government, a rational trier of fact could conclude that the payments made to the Commissioners by [the victims] were induced by fear of economic loss.

Id. at 271.

Frey argues that in *Stodola* (and likewise *Crockett* and *Lisinski*) the "victims reasonably feared that they would suffer economic harm for non-payment....This is different from *Garcia* (and allegedly Frey) who were allegedly being paid to help them get a benefit from a third party and not from a fear of being economically harmed by the defendant...The case law then shows that based on the Indictment allegations herein, there can be no extortion because it alleges the victim (Lambert) was seeking a

gain (getting a plea agreement he was not legally entitled to) and not fearing a potential harm (economic loss) of something he already had when he met the Defendant or his alleged accomplice." Defendant's Memorandum, p. 7. Frey elaborates on his argument that the indictment is insufficient to establish the wrongful use of economic harm by writing that:

> There is no indication from the Indictment that (1) Lambert reasonably believed that Defendant and/or his alleged accomplice had the power to economically harm Lambert by preventing his retention of the license nor (2) that Lambert reasonably believed that non-payment would lead Defendant or his alleged aider and abetter to sue this non-existent power to his detriment (the essence of economic harm not speculative gain). Indeed, discovery materials lead to the opposite conclusion, that is, Lambert his "rock bottom," was going to get convicted of another felony and probably go to jail, and that Defendant could only try to help him. But, because Defendant was not Lambert's attorney nor the Prosecuting Attorney, he couldn't make Lambert's situation worse. The only person who could have received payment so to establish fear of economic harm and thus be a Hobbs Act defendant would have been the Prosecuting Attorney who was handling Lambert's case and had the power to offer (or not) a plea agreement or the Judge who would have had to accept the plea agreement.

Defendant's Memorandum, pp. 8-9.

The Government, of course, rejects Frey's argument that the

element of fear of economic harm was not present in this case and argues that this case is in fact "squarely within the holding of *United States v. Crockett*..." Government's Response, p. 7. The Government argues that "[u]nder the Hobbs Act, it is not necessary for the defendant or his accomplice to have actually threatened Lambert, the mere exploitation of Lambert's professed fear regarding the loss of his firearm's license is enough." *Id.* (citing *Lisinski*). The Government also claims that "neither Frey nor his accomplice need to have created the situation causing the victim's alleged fear." *Id.* (citing *Lisinski* and *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974).

In *Lisinski*, the victim restaurant owner contacted the defendant for help in retaining his liquor license. *Lisinski*, 728 F.2d at 889. Lisinski argued, as does Frey, that the restaurant owner's "fear of economic harm was self-generated" since Lisinski never actually threatened to impede the owner's ability to obtain and keep his license. *Id.* at 890. The Seventh Circuit rejected that

argument and held that [e]xploitation of, or preying upon, the victim's fear constitutes wrongful use of fear and satisfies the statute." *Id.* at 891. The Seventh Circuit had previously made this holding in *Crowley* when it explained that "the exploitations of the victim's reasonably fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats." *Crowley*, 504 F.2d at 996. Because the victim in *Crowley* was never threatened and the extortionist "always comported himself as a gentleman," the defendant argued that that was evidence that the money "was paid voluntarily as remuneration for services rendered." *Id.* The court rejected that argument and stated that "[t]he fact that relations between the victims and the extorters were often cordial is not inconsistent with extortion." *Id.* In the more recent *Crockett* case, the Seventh Circuit reiterated that "[t]he wrongful use of fear of economic harm is established by showing that the defendant preyed upon or exploited the victim's fear of economic harm."

Crockett, 979 F.2d at 1212. Thus, the fact that Frey may not have threatened Lambert or caused any fear of economic loss that Lambert may have had is irrelevant. The only issue is whether Frey exploited that fear. Frey argues, as discussed above, that Lambert paid money to obtain a benefit, not out of any fear of economic harm. In *Crowley*, for example, the victims owned the Bryn Mawr Bowling Lanes on the south side of Chicago in a neighborhood with much crime. Fearing they would suffer economic harm if they did not protect their premises, they agreed to make monthly payments to two Chicago police officers in exchange for security services (which they apparently never received). However, even though the police officers did not create the circumstances that caused the victim's fear of economic loss, and even though the police officers apparently never threatened the owners, the court held that the payments were the result of extortion by way of exploitation of fear of economic loss.

In the present case, while Lambert may indeed have been seeking a "benefit," that does not automatically mean that this case

is analogous to *Garcia*. While it may be true that Lambert was hoping that Frey could influence that state court proceedings in a way that would prevent Lambert from being convicted of a felony (and perhaps serving time in prison), that is not inconsistent with the allegations of extortion.

If, as the Government contends, Lambert feared losing his federal firearm's license,[3] then being susceptible to exploitation in the manner alleged would be a logical outgrowth of that fear. The court agrees with the Government that this situation is more analogous to *Crockett* or *Crowley* than it is to *Garcia*. In both *Crockett* and *Crowley* the victims feared economic harm to their businesses.

As a result, they felt compelled to pay the defendants money to prevent that harm from occurring. The victims in those cases, like Lambert, were seeking a "benefit" of sorts from the extortionists – influence in one case and protection in another. And, like Lambert, the fear of economic harm harbored by the victims in

those cases was not caused by the extortionists, but by a situation in which the victims found themselves. In each case the defendants took advantage of that fear, as Frey is alleged to have done.

While he does not use this language, Frey's argument, reduced to its core, seems to be that this entire situation involved merely some unsavory and perhaps unethical, but not illegal, dealings between Frey and Lambert. Whether that is the case or not turns on Frey's (and Lambert's) intentions when the two men entered into their dealings, an issue which depends largely on credibility determinations. Frey's argument is ultimately one to be made to a jury and not one to be determined by the court in the

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[3] Frey also argues that any fear Lambert may have had about losing his firearm dealer's license was not reasonable, since the license had been transferred to Lambert's wife. Thus, Lambert could not fear losing something he did not have. Defendant's Memorandum, p. 4. However, the fact that the license was transferred to Mrs. Lambert only *after* Lambert was facing felony charges lends credence to the Government's argument that the "transfer of the license to [Mrs. Lambert] did not relieve [Mr. Lambert] of all fear concerning what effect a felony conviction could have on the license. The conviction would prevent him from ever receiving the license back from his wife and might affect his ability to continue working at his sporting goods store. Also, the transfer may have been voided by the Bureau of Alcohol, Tobacco & Firearm if the felony conviction occurred, should the transfer be viewed as a sham." Government's Response, p. 6 n. 2.

present motion to dismiss. All that is really before the court at present is, as Frey questions, whether the indictment alleges "the essential facts constituting extortion by the wrongful use of fear of economic harm." Defendant's Memorandum, p. 3. Having reviewed the indictment itself and the applicable case law, the court determines that the facts presented in that indictment are clearly sufficient to allege the crime of extortion by wrongful use of economic harm. The facts alleged in the indictment, on their face, are more analogous to the situations in *Crockett, Crowley,* and *Lisinski* and they are to *Capo* and *Garcia.* As stated previously, whether Lambert was acting out of fear of economic harm or simply "purchasing an advocate" is an issue for the trier of fact. But for purposes of the present motion, the court determines that the factual allegations in the indictment are sufficient to adequately inform Frey of the crime with which he was charged and allow him to prepare his defense.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss filed by the Defendant Bruce Frey is hereby **DENIED.**

Entered: November 26, 1997.

_____

William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA)		
	)	
v.	)	CAUSE NUMBER:1:97-CR-4
	)	
BRUCE FREY	)	

ORDER

Before the Court is Defendant, Bruce Frey's, Motion for Judgment of Acquittal. On October 30, 1998, a jury found Frey guilty of violating the Hobbs Act, 18 U.S.C. § 1951. Frey had moved for Judgment of Acquittal on October 28, 1998, and the Court took the Motion under advisement and ordered briefing. Frey filed his Brief in Support of the Motion for Judgment on Acquittal on May 24, 1999, the Government responded on July 12, 1999, and Frey replied on July 30, 1999.

For the reasons that follow, the Court DENIES Defendant's Motion for Judgment of Acquittal.

FACTS

On January 10, 1994, James Lambert ("Lambert") threatened law officers with a loaded firearm. He claims he did this in an attempt to be shot and killed by the police; hence, it was an attempt to commit suicide. Defendant's Breif at 12, citing Tr. 10/27/98 22-25 and Tr. 10/26/98 157:1-5. Lambert was arrested and charged with four felony counts. *Id.*, citing Government's Exh. 12; Tr. 10/26/98 156:1-14. Among other things, Lambert feared that if he were convicted of ay of the felony charges, he would lose his federal firearms license. Defendant's Brief at 13, citing Tr. 10/27/98 56:1-9; 114:4-12. Lambert also feared that a felony conviction resulting from his January, 1994, arrest would prevent him from possessing a firearm. Government's Response at 4, citing Tr. 10/27/98 27. The loss of Lambert's ability to handle firearms while working in his store would shut down his sporting goods business because sales of firearms were the business's major revenue source and he was almost solely responsible for selling firearms. *Id.*, citing Tr. 10/27/98 27-28, 115-16.

Lambert claims to have been unaware of a prior felony conviction, dating from 1977. Defendant's Brief at 11, n.3, citing Tr. 10/27/98 14-17. He should never have been issued a federal license in the first place. In any event, after his arrest but before entering his plea, Lambert transferred his federal firearms license which he held jointly with his wife to his wife's name alone. Defendant's Brief at 11, citing Tr. 10/27/98 19; 17-24:1-6. Lambert's federal firearms license expired on June 1, 1994. *Id.*, citing Tr. 10/27/98 19:17-21; Government's Exh. 13A. Thus, before the time in which the Government alleged that Frey violated the Hobbs Act, that is, between December 12, 1994 to January 31, 1996, the Bureau of Alcohol, Tobacco and Firearms ("AFT") had approved the reissuance of the license to Lambert's wife.

On January 22, 1997, the Defendant, Bruce Frey, was indicted in the United States District Court, Northern District of Indiana, Fort Wayne Division. In relevant part, the Indictment against Frey read that from December 12, 1994, until on or about January 31, 1996, Frey:

> did unlawfully attempt to obstruct, delay and affect commerce, as that term is defined in 18 U.S.C. § 1951, and the movement of articles, commodities and funds in such commerce, by extortion, as that term is defined in 18 U.S.C. § 1951, in that the defendant Frey did attempt to obtain the property of James Lambert with his consent being induced by the wrongful use of actual or threatened fear, specifically the fear of economic harm, in that the defendant and the defendant's accomplice did state to James Lambert that for a fee of $20,000.00, the defendant and/or the defendant's accomplice could arrange to have the felony charges pending against Lambert in Grant Superior Court 1, Cause #27D01-9401-CF-6 reduced to misdemeanor charges which would allow Lambert to retain his federal firearms license...."

Lambert testified at trial that Frey told him that if he paid money to Thomas Hubbard ("Hubbard"), the felony charges would be dropped or lowered to the point that he could keep his federal firearms license. Defendant's Brief at 13, citing Tr. 10/27/98 28; 19-25: 1-5. Hubbard testified at trial that Frey approached him and asked if he wanted to make some money by picking up money from James Lambert that was to be brought to Frey and paid to the prosecutor's office to fix Lambert's pending felony charges. Government's Response at 5, citing Tr. 10/27/98 145-48. Frey told Hubbard to use Lambert's loss of his firearms license as a way

to persuade Lambert to pay the $20,000.00. *Id.*, citing Tr. 10/27/98 149. Hubbard testified that Frey later admitted to him that no money was ever going to be paid to the prosecutor's office. *Id.*, citing Tr. 10/27.98 150-53.

On October 30, 1998, after a trial, the jury found Frey guilty of violating the Hobbs Act, 18 U.S.C. § 1951.

STANDARD OF REVIEW

United States v. Hagan, 913 F.2d 1278, 1281 (7th Cir. 1990) states that the standard for granting a Judgment of Acquittal Motion is as follows:

> whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt viewing the evidence in the light most favorable to the government... bear[ing] in mind that 'it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidenctiary conflicts and draw reasonable inferences.'

Quoting *United States v. Reed*, 875 F. 2d 107, 111 (7th Cir. 1989) (cite omitted). A Court must grant a Motion for Judgment of Acquittal when the evidence "is so scant that the jury could only

speculate as to the defendants guilt...and is such that a reasonably-minded jury must have a reasonable doubt as to the defendant's guilt." *United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980) (internal cite omitted). In considering the motion the Court should examine the evidence as a whole including that provided by the defendant. *Id.* "[A] motion for acquittal after a jury verdict of guilty may be granted only when the relevant evidence is insufficient to prove all the elements of the charged offense." *Id.*

DISCUSSION

In relevant part, the Hobbs Act provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by...extortion or attempts or conspires so to do (commits an offense under this title).
>
> (b) As used in this section –

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Both parties cite *United States v. Granados*, 142 F3d 1016, 1020 (7th Cir. 1998) for the elements of attempted extortion under the Hobbs Act. Defendant's Brief at 5; Government's Response at 3. *Granados* states: "To support a conviction for attempt to commit extortion, the government needed to prove [1] that Granados attempted to obtain money or property from Grajeda through extortionate means (i.e. through the wrongful use of force or fear), and [2] that the extortion affected interstate commerce... The government also needed to prove [3] that Grajeda's fear was reasonable." *Granados* at 1020 (citations omitted).

Fear of Extortionate Means

Frey argues that the Government failed to prove that the victim, Lambert, "reasonably feared the defendant's extortionate

means." Brief in Support of Defendant's Motion, at 5. The Government responds that Frey misstates the law in this assertion. Response at 3. The Government argues that "the victim need not fear the defendant, and the defendant need not have created the fear or made any threats, it is sufficient if the defendant wrongfully exploited a fear he perceived in the victim." *Id.* Frey himself observes that the pivotal issue in this Motion for Judgment of Acquittal is the meaning of "reasonable fear" when applied to the facts of this case. Reply at 1.

A recurring argument Frey makes is that "reasonable fear" means fear of the economic harm Frey might cause Lambert. Defendant's Brief at 5-10, 16-20. Frey rests this proposition on cases outside the Seventh Circuit. In *United States v. Capo*, 817 F2d 947 (2nd Cir. 1987), the defendants accepted gifts and cash payments in return for hiring certain people. The Second Circuit held that the actions of the defendants did not constitute

extortion since the victims were not induced to pay money by the wrongful use of fear of economic harm such as fear of losing jobs they already had. Rather, they voluntarily paid the defendants in order to improve their chances to obtain jobs. *Capo*, at 953. Frey quotes *Capo* to the effect that in order to find guilt, the jury had to find that the victim reasonably believed that the defendant had the power and influence to hurt the victim's prospects of obtaining employment. Defendant's Brief at 6, citing *Capo* at 951. However, as the Government points out, Frey omitted the qualifying phrase, "to find the defendant guilty of extortion." Government's Response at 8, citing *Capo* at 951. The fact that the instant case concerns attempted extortion diminishes somewhat the relevance and point of the *Capo* quotation.

In *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990), a Congressman and his wife informed a corporation called Webtech that they had influence with high ranking Navy officials and could assist Webtech in contract procurement activities in exchange for payments. Webtech approved the payments, fearing that a denial

would induce the congressman to withhold his support. *Garcia*, at 383. The Second Circuit held that this did not constitute a threat of economic harm by Garcia. The Court stated:

> The central fact is clear: even in the face of Garcia's disgraceful request for money, Webtech was not risking the loss of anything to which it was legally entitled. Webtech would still be permitted to bid on government contracts, but without Garcia's favorable attitude, the company might not be able to count on continued preferential treatment, nor could it secure Garcia's favorable interventions in the future. Garcia in turn was in effect offering to sell his congressional power, but he was not using that power as a way to intimidate Webtech. By paying the Garcia's, Webtech was purchasing an advocate not buying off a thug.

Garcia, at 383-84. Frey argues, then, that like the defendants in *Capo* and *Garcia*, he did not threaten Lambert with economic harm, nor was he in a position to influence the Grant County prosecutor's office or prevent Lambert or Lambert's wife from renewing their gun licenses. He only offered his assistance in facilitating a payment to the prosecutor's office that would allow Lambert to plead to a lesser charge so that he or his wife could renew their gun licenses, he could continue to handle guns, and the business could go on.

In the Court's Order of November 26, 1997, which denied Frey's Motion to Dismiss, the Court noted these cases, and also cases from the Seventh Circuit. In *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992), the victim Panice, thought Albert Tocco, the reputed "boss of Chicago Heights," could help him get a liquor license. Several months after obtaining a liquor license, Tocco told Panice he would now have to pay him $4,000. Tocco did not threaten or indicate to Panice that his license would not be renewed if he did not pay Tocco. *Crockett*, at 1212. The Seventh Circuit distinguished this case from *Garcia*, noting that Panice made the payments to protect his license and concluding, "there was adequate evidence to permit a rational trier of fact to find that the payments were induced by fear of economic harm." *Crockett* at 1213. In *United States v. Stodola*, 953 F.2d 266 (7th Cir. 1992), the Seventh Circuit held that the victims, who were contractors, made payments to the defendant, who was a County Commissioner, out of fear of economic harm. Again, the Court distinguished the case from *Garcia*, stating that in *Garcia*, the evidence "did not establish

that the company acted out of fear that without these payments [to a congressman] it could lose existing contracts or even opportunities to which it was legally entitled." *Garcia*, 907 F.2d, at 385. In *Stodola*, however, there was evidence that the victims "would not get the cleaning contract without paying the Commissioners more money than [other companies were] paying....[A] rational trier of fact could have concluded that the payments made to the Commissioners by [the victims] were induced by fear of economic harm." *Stodola*, at 271. In *United States v. Lisinski*, 728 F.2d 887 (7th Cir. 1984), cert. Denied, 469 U.S. 832, 105 S.Ct 122, 83 L.Ed.2d 64 (1984), a restaurant owner, Patras, contacted Lisinski who had friends in the Illinois Liquor Control Commission, for help in retaining his liquor license. In the presence of the restaurant owner, Lisinski asked the executive director of the Commission to unblock the license, and he complied. Later, Lisinski demanded a thousand dollars, which Patras paid. Still later, Lisinski demanded another thousand dollar payoff, and afterwards, made two other demands. Lisinski was

found guilty of extortion for the second, third and fourth demands. The Seventh Circuit affirmed the conviction, even though Lisinski issued no threat, and Patras's fear of economic fear was self-generated.

In *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974), the Seventh Circuit affirmed the conviction of a police officer who collected payoffs to protect a bowling alley business. *Crowley*, at 996. Although the Court cited the "under color of official right" language of 18 U.S.C. § 1951 (b) (2) to support its affirmation of Crowley's conviction, the Court also stated that it "need not solely rest upon the above rationale to support the jury's finding..." *Crowley*, at 995. The Court went on to indicate that

> the exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any threats. Accordingly, Crowley was charged with extorting money through the use of economic harm, the issue on which the jury heard evidence, was instructed, and reasonably could have concluded the defendant's guilt.

Crowley, at 996, citing *Callanan v. United States*, 223 F.2d 171, 174-76 (8th Cir. 1955), cert, denied, 350 U.S. 862, 76 S.Ct. 102,

100 L.Ed. 764. This rationale is significant for the instant case. In *Crowley*, there was no evidence that the police officer claimed to have the power to cause the break-ins and thefts that plagued the bowling alley and threatened its economic ruin. For the money he received, Crowley repeatedly promised better protection to stave off this economic harm, reasonably feared by the proprietors of the bowling alley. That was enough for conviction.

In its November 26 Order, the Court concluded that the situation of the instant case is more analogous to *Crocket* or *Crowley* than to *Garcia*. Order of November 27, 1997 at 1314. Rather than hiring an advocate to obtain a business advantage, Lambert, like the victims in *Crocket* and *Crowley* feared economic harm, perhaps ruin. The xtortionists in every instance wrongfully exploited the situation, offering to stave off the feared economic loss by obtaining for the victims what the victims had a legal right to have in the first place (fair consideration of a liquor license in *Crocket*, police protection in *Crowley*, and justice in *Frey*) in exchange for money. *Id.* at 14. The victims paid to avoid a feared

economic loss, not to obtain a desired gain.

In his Motion for Judgment of Acquittal, Frey takes one more shot at arguing that the Seventh Circuit cases are distinguishable from the instant case. Frey argues, "[T]he Seventh Circuit's distinguishment of *Capo* and *Garcia* was not because the Seventh Circuit does not require that the victim reasonably fear the defendant, but because in those circumstances there was after-the-fact evidence to support the victims' reasonable belief that the defendant actually had the power to harm them." Brief at 9.

> The defendants in those cases [the Seventh Circuit cases] were proven quantities... [I]n *Lisinski* it was the **second payoff** after the defendant had proven they had the power to influence the victim's liquor license that supported the conviction... The Commissioners in *Stodola* had proven that they had the power and were willing to award contracts for kickbacks thus it was reasonable to conclude they would deny contracts to companies failing to pay kickbacks... While in *Crocket* the defendant ... had proven that he could influence the acquisition of a liquor license in that community, it was when he came back claiming they were "partners" and demanding additional payments that the victim reasonably feared the defendant had the power to harm him since he was able to get him the license in the first place....

Brief at 10 (original emphasis). Frey does not point to any

language in these Seventh Circuit cases which supports this rationale of distinction. The opinions do not indicate that the proven influence or effectiveness of the extortioners indicated their power to harm the victim, thereby fulfilling a requirement that the victim reasonably fear the power of the extortioner to cause the victim economic harm. What distinguishes *Capo* and *Garcia* from the Seventh Circuit cases is that the former involved payments for an economic advantage whereas the latter involved payments to avoid a ruinous economic harm.

In his Brief in Support of his Motion for Judgment of Acquittal, Frey also cites a case from the Eleventh Circuit, *United States v. Livingston*, 665 F.2d 1003 (11th Cir. 1982), in which the defendant offered a company information about an embezzler in exchange for $200,000. Defendant's Brief at 8. In this case, the Eleventh Circuit stated, "In order to be guilty of the wrongful use of fear, ...a party must cause or threaten to cause the economic loss to occur." *Livingston* at 1005. But as the Government points

out, the Seventh Circuit has ample case law indicating that it is not necessary for the defendant to cause or threaten economic harm. "The exploitation of the victim's reasonable fear and despite the absence of any direct threats." *Crowley*, 504 F.2d at 996. There is no requirement in the Seventh Circuit that the Defendant have the power to harm the victim economically.

"Exploitation of, or preying upon, the victim's fear constitutes wrongful use of fear and satisfies the statute." *Lisinski*, 728 F.2d at 891. And, though Frey argues that in *Granados*, the Seventh Circuit applied the requirement that the victim reasonably fear the extortioner's "extortionate means" (Defendant's Reply at 4-5), *Granados* in fact cites *Crowley* and states, "[T]he *sine qua non* of a § 1951 violation is the wrongful use of the victim's fear, regardless of whether the defendant created the fear or even intended to create the fear." *Granados*, 142 F.3d, at 1021.

Even if the Second and Eleventh Circuit required that the victim fear the power of the extorioner to cause economic harm, this Court must follow the teachings of the Seventh Circuit. The

Seventh Circuit does not require that the victim of Hobbs Act extortion reasonably fear that the extortioner may cause economic harm. It is sufficient that the victim have a reasonable fear of economic harm which the extortioner preys upon or exploits to obtain money from the victim.

Defendant's Arguments

Frey argues that Lambert could not have feared an economic harm predicated on losing something he had already given up. Lambert transferred the federal firearms license he jointly held with his wife into his wife's name prior to the time period alleged in the Indictment. When the license was renewed, it was renewed in Donna Lambert's name. Again, this was before the time of the violation alleged in the Indictment. Frey argues, then, that since Lambert was able to continue his gun dealing business on the basis of his wife's license, he did not have any reasonable economic fear of losing the business should he be convicted of a felony and be rendered unable to retain or regain his gun license. Defendant's Brief at 11.

The Government points out that Lambert transferred his firearms license after his January, 1994, arrest and the filing of four felony charges against him. He retained the benefit of the license because he continued to work in the sporting goods store. But regardless of the transfer, Lambert could reasonably have feared that a felony conviction could (1) prevent the transfer of the license back to him; (2) cause the business to fail because he would no longer be permitted to handle and sell firearms; or (3) cause the discovery of his prior felony (assuming Lambert knew his earlier conviction was a felony). Government's Response at 9.

Defendant's argument misses the point. Frey focuses on Lambert's fear of not being able to have a firearms license and argues that since he had already given up his license, he had nothing to fear from a felony conviction. What Lambert feared, however, was that a felony conviction would render him unable to participate and thereby continue his firearms business. This is quite clear from Lambert's testimony.

Q. Can you possess a firearm if you have a felony conviction

A. No, I cannot.

Q. And why would you shut your business down?

A. ...Firearms is the mainstay of the business; a sporting goods store.

Q. And did you in your business, have a particular responsibility with respect to the sale of firearms?

A. I was just about solely, you know, my wife has very limited knowledge of firearms and I was the one that did the sales of the firearms

Tr. 10/27/98 27-28. Lambert then had the actual fear of losing his livelihood on account of a possible felony conviction. There was some discussion in the briefs to the effect that it is Frey's state of mind, rather than Lambert's that is relevant to an attempted violation of 18 U.S.C. § 1951. Government's Response at 10-11; Defendant's Reply at 5-7. In other words, for Frey to be guilty of attempted extortion, it was necessary for *Frey* to perceive that Lambert could have had a reasonable fear of economic harm, and

for Frey to exploit or prey upon that fear. The Court agrees that, whatever fear Lambert may actually have had, for Frey to be guilty of attempted extortion, it was necessary that the purported fear which Frey attempted to exploit be a fear of economic harm that Lambert could reasonably have harbored.

It is, however, crystal clear that Lambert's actual, professed fear of being unable to carry on his firearms business after one or more felony convictions was reasonable, for under 18 U.S.C. § 922(g), it is unlawful for a person who has been convicted of a felony to be in possession of a firearm. If Lambert were convicted of a felony, he would not be able to handle firearms, and his business would suffer, probably ruinously. Furthermore, there was evidence that Frey exploited this fear. The Government quotes instances in which Frey frequently speaks to Lambert about the gun license, thereby preying upon Lambert's fear that he may lose his business. Government's Response at 6-7, citing Conversation, Frey, Lambert, Hubbard, 12/15/94, Govt. Exh. 4A. Thomas Hubbard testified that Frey told Hubbard to use Lambert's loss of

his firearms as a way to get Lambert to pay the $20,000.00. Government's Response at 5-6, citing Conversation, Lambert. Hubbard, 12/8/94, Govt. Exh. 1A. Viewed in the light most favorable to the Government, it was reasonable for the jury to conclude beyond a reasonable doubt that the Defendant was exploiting Lambert's fear of losing his economic livelihood in the event he be convicted and rendered unable to take advantage of a gun license.

Frey argues that Lambert was "purchasing an advocate" rather than "paying off a thug." Defendant's Brief at 12-16. In advancing this argument, Frey contends that Lambert had an involuntary intoxication defense to the felony charges, and that Lambert did not feel threatened by Frey, and did not feel that Frey's demands were a shake-down. *Id.*, at 13-14. None of these, not Lambert's defense, nor his fear of jail, nor the cordiality of his dealings with Frey, undercuts the evidence that Lambert had a reasonable fear of economic harm which Frey wrongfully exploited. Frey's contention that Lambert was merely negotiating

for an advocate has already been addressed. The Court has long ago ruled that the instant case is more analogous to the Seventh Circuit cases affirming convictions for extortion, such as *Crocket*, *Crowley*, and *Lisinski*, than it is to the Second Circuit's cases of advocate purchasing, *Capo* and *Garcia*. The Government's allegations and evidence indicate that Lambert was not hiring an advocate, rather Frey was wrongfully exploiting Lambert's reasonable fear of economic harm.

Frey argues that Lambert did not fear Frey's power to harm him economically, and furthermore, could not have reasonably feared that Frey possessed such power. Defendant's Brief at 17-20. Frey contends there was no evidence that Frey could influence the prosecutor's office to convict Lambert of the felonies he was charged with, nor was there evidence that Frey could influence the Bureau of Alcohol, Tobacco and Firearms to deny Lambert's firearms license. *Id.* The Court had already addressed these issues in finding that the Seventh Circuit does not require that the victim of extortion fear the power of the extortioner in order for there to

be a violation of 18 U.S.C. § 1951. The wrongful exploitation of the victim's reasonable fear of economic harm is sufficient for a violation of the statute. In support of this proposition, the Court has cited *Crowley* 504 F.2d at 996, *Lisinski*, 728 F.2d at 891, and *Granados*, 142 F.3d, at 1021. The Court has already found that the Government provided ample evidence for a reasonable jury to find this element.

Finally, Frey argues that even if Lambert believed, actually or reasonably, that Frey possessed the power to harm him economically, Lambert could not have believed that Frey would use such power to Lambert's economic detriment. Defendant's Brief at 20. There is no evidence that Frey indicated he would influence the Grant County Prosecutor's Office or the Bureau of Alcohol, Tobacco and Firearms against Lambert. *Id.* The Court has already addressed this issue in finding that for a violation of the Hobbs Act, the Seventh Circuit does not require the extortioner to threaten the victim. *Crowley* 504 F.2d at 996, *Lisinski*, 728 F.2d at 891, and *Granados*, 142 F.3d, at 1021.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2000

NO._____

BRUCE M. FREY Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PROOF OF SERVICE

The undersigned, being duly sworn and upon oath, certifies that on the 21st of May, 2001, three (3) copies of the above-captioned Petition for Writ of Certiorari were mailed by regular United States mail, postage prepaid to:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave. N. W.
Washington, D.C. 20530-0001

Bruce M. Frey
355 South Madison Street
Bloomington, IN 47403
(812) 333-4728
Petitioner

Bruce M. Frey

STATE OF INDIANA, COUNTY OF VIGO, SS:

Before me, a Notary Public in and for said County and State, personally appeared Bruce M. Frey, who being duly sworn and upon oath stated that the above and foregoing statement as to Proof of Service was true and correct.

MY COMMISSION EXPIRES: 03-22-2008

Mary Ellen Collins

NOTARY PUBLIC

~~Vigo~~ Clay County Resident

05-21-2007

CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's Motion for Judgment of Acquittal.

SO ORDERED this ___ day of October 2000.

William C. Lee, Chief Judge
United States District Court

No. 00-1786

In the Supreme Court of the United States

BRUCE M. FREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed petitioner's conviction for attempted extortion in violation of 18 U.S.C. 1951.

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In the Supreme Court of the United States

No. 00-1786

BRUCE M. FREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A5) is unpublished, but the judgment is noted at 248 F.3d 1160 (Table). The district court's orders denying petitioner's motion to dismiss (Pet. App. B1-B27) and denying petitioner's motion for judgment of acquittal (Pet. App. C1-C25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2001. The petition for a writ of certiorari was filed on May 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of attempted extortion, in violation of 18 U.S.C. 1951, and was sentenced to 23 months' imprisonment. The court of appeals affirmed in an unpublished order. Pet. App. A1-A5.

1. James Lambert operated a hunting and fishing equipment store in Grand County, Indiana, and was licensed to sell firearms. Firearms sales were the mainstay of the store's business. In January 1994, police were called to Lambert's home and, while there, engaged in a struggle with Lambert over a gun. The officers found illegal drugs in Lambert's possession. Lambert was later charged with four felony counts, including criminal recklessness and possession of a controlled substance. Lambert's attorney was unable to negotiate a plea agreement that would not require Lambert to plead guilty to a felony. A felony conviction would result in the loss of his license to sell firearms at his store. Pet. App. A2; see 18 U.S.C. 922(a) and (g), 923(d).

Prior to trial, Lambert asked petitioner, whom he knew to be an attorney, for assistance with his criminal case. Pet. App. A2-A3.[1] Petitioner returned to Lambert's store several days later and told Lambert that he had "checked in" with the local prosecutors and that he would be able to "do something" about the charges. In exchange for a favorable disposition of the charges, however, petitioner demanded $20,000 from Lambert. *Id.* at A3. Petitioner stressed to Lambert "over and

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[1] Petitioner "resign[ed] from practice while disciplinary charges were pending [against him]." *In re Frey*, 2001 WL 66365 (T.C. Jan. 19, 2001).

over" the importance of avoiding a felony conviction if Lambert wished to retain his firearms license. *Ibid.* Petitioner told Lambert to use a mutual acquaintance as a "go-between" and instructed Lambert not to inform his counsel of record, David Payne, about their arrangement. *Ibid.*

Lambert eventually told Payne about petitioner's demand. Pet. App. A3. Payne contacted the state police, who directed Lambert to make payments of $20,000 to petitioner and his go-between, Thomas Hubbard. *Ibid.* On January 22, 1997, a federal grand jury indicted petitioner on one count of attempted extortion, in violation of 18 U.S.C. 1951. Pet. App. A4. For pertinent purposes, "extortion" includes "the obtaining of property from another, with his consent, induced by wrongful use of * * * fear." 18 U.S.C. 1951(b)(2).

2. Petitioner moved to dismiss the indictment, arguing that, even if true, the allegations did not establish a violation of 18 U.S.C. 1951. The district court denied that motion. Pet. App. B1-B27. In particular, the court rejected petitioner's argument that the indictment did not sufficiently charge extortion, because it did not allege that Lambert paid petitioner $20,000 out of fear of economic harm. *Id.* at B11-B26. As the court explained, petitioner's argument, "reduced to its core, seems to be that this entire situation involved merely some unsavory and perhaps unethical, but not illegal, dealings between [petitioner] and Lambert." *Id.* at B25. The court reasoned that that issue "turns on Frey's (and Lambert's) intentions" and "depends largely on credibility determinations" and thus was an issue "to be made to a jury and not one to be determined by the court" in ruling upon a motion to dismiss. *Ibid.* The court further held that, on its face, the indictment was more than "sufficient to adequately inform [petitioner]

of the crime with which he was charged and allow him to prepare his defense." *Id.* at B26.

A jury found petitioner guilty of attempted extortion in violation of the Hobbs Act. Pet. App. A4. Petitioner moved for a judgment of acquittal, arguing that the government had failed to prove the requisite use of fear. The district court denied that motion. *Id.* at C1-C25. The court explained that the government was not required to prove that petitioner could cause economic harm to a victim, but merely that he exploited or preyed upon the victim's fear of such harm. *Id.* at C17-C18. In so ruling, the district court distinguished cases that "involved payments for an economic advantage" from cases, such as this, that "involved payments to avoid a ruinous economic harm." *Id.* at C16. Moreover, the court found that the evidence supported the government's theory that Lambert "had the actual fear of losing his livelihood on account of a possible felony conviction" (*id.* at C20), and that petitioner preyed upon that fear (*id.* at C21-C22).

3. The court of appeals affirmed in an unpublished order. Pet. App. A1-A5. The court explained that petitioner's "arguments on appeal, though framed as both sufficiency-of-the-evidence and constitutional challenges, boil down to a contention that this court has incorrectly interpreted the Hobbs Act." *Id.* at A4. The court rejected that contention, explaining that its cases "make clear * * * that in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be created by the extortioner"; rather, "the extortioner need only exploit" the victim's fear, which "can be preexisting." *Ibid.* The court further found that there was sufficient evidence for a reasonable jury to find that "[petitioner] exploited Lambert's fear." *Id.* at A5. In particular, the court explained that Lambert

testified that "he was 'extremely' aware" that a felony conviction would basically shut down his firearms business, and that petitioner "stressed repeatedly the importance of avoiding" a felony conviction. *Ibid.*

ARGUMENT

The unpublished order of the court of appeals does not conflict with any decision of this Court or of another court of appeals. The evidence supports petitioner's conviction for attempted extortion. Further review is not warranted.

1. Petitioner renews his contention (Pet. 5-15) that the court of appeals incorrectly interpreted the Hobbs Act and argues that its decision conflicts with the decisions of other circuits. That contention is without merit. No court of appeals has held that a defendant's exploitation of a victim's reasonable fear of economic harm cannot constitute extortion under Section 1951 if the defendant is not the source of the feared economic harm. The different outcomes in the cases cited by petitioner depend on the facts of the underlying prosecutions, and not on any circuit conflict over the proper interpretation of the Hobbs Act.

The Hobbs Act defines "extortion" as obtaining property from another with his consent, "induced by wrongful *use of* * * * fear." 18 U.S.C. 1951(b)(2) (emphasis added). As the court of appeals below explained, "in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be *created by* the extortioner." Pet. App. A4 (emphasis added). Rather, a defendant's attempt to exploit such fear is sufficient. See, *e.g.*, *United States* v. *Knox*, 68 F.3d 990, 996 (7th Cir. 1995) ("Mr. Carreiro need not personally have caused Mr. Hoppe's fear; that he exploited that fear is sufficient to establish a violation of the Hobbs

Act."), cert. denied, 516 U.S. 1119 (1996); *United States* v. *Lisinski*, 728 F.2d 887, 891 (7th Cir.) ("The extortionist need not be responsible for the situation in which the victim finds himself."), cert. denied, 469 U.S. 832 (1984).[2]

The Second Circuit cases cited by petitioner (Pet. 8) do not stand for a contrary proposition. Indeed, in *United States* v. *Capo*, 817 F.2d 947, 951 (1987) (en banc), the Second Circuit recognized that it was *not* necessary for the defendant to create the fear in the minds of his victims, so long as the defendant intended to exploit the victims' fear of economic loss. The holding in *Capo* that the defendants' activities were not proscribed by the Hobbs Act turned instead on the fact that the victims were hoping for an economic benefit, not fearing an economic harm, and thus "the evidence of fear of economic loss was insufficient." *Id.* at 952. Likewise, in *United States* v. *Garcia*, 907 F.2d 380, 382 (2d Cir. 1990), the court concluded that the evidence "was insufficient to support an extortion conviction based on a fear of economic loss," and thus there was no need for the court to consider whether a Hobbs Act defendant must create the fear that he exploits. In

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[2] Petitioner confuses a victim's fear of an underlying economic harm with a defendant's exploitation of the victim's fear. For example, petitioner erroneously cites *United States* v. *Granados*, 142 F.3d 1016 (7th Cir. 1998), for the proposition that the victim in a Hobbs Act prosecution must reasonably "fear the defendant's extortionate means." Pet. 6. *Granados*, however, makes clear that the "fear" component of a Section 1951 extortion prosecution involves the victim's fear of the underlying economic harm, not the fear of the extortion: "Thus the *sine qua non* of a § 1951 violation is the wrongful use of the victim's fear, regardless of whether the defendant created the fear or even intended to create the fear." *Granados*, 142 F.3d at 1021.

this case, the evidence overwhelmingly supported the government's claim that Lambert feared economic harm, and that petitioner exploited that fear. Pet. App. A5.

Similarly, the Fifth Circuit case cited by petitioner (Pet. 10), *United States* v. *Tomblin*, 46 F.3d 1369 (1995), does not stand for the proposition that the economic harm feared by a Hobbs Act victim must be caused by the defendant. Consistent with the Seventh and Second Circuits, the Fifth Circuit stated in *Tomblin* that "the defendant need not create the fear, so long as the defendant *uses* it to extort property." *Id.* at 1384 (emphasis added). Likewise, the Sixth Circuit has upheld a Hobbs Act conviction in which the defendant exploited the victims' fear of tax problems resulting from an IRS audit. *United States* v. *Valenzeno*, 123 F.3d 365 (1997). As the Sixth Circuit explained in *United States* v. *Williams*, 952 F.2d 1504 (1991), a Hobbs Act extortionist "need not be responsible for the state of fear in which the victim finds himself," so long as the extortionist "exploits that fear and thereby wrongfully obtains money or property." *Id.* at 1513. The Fourth Circuit has similarly held that a victim's fear of economic harm is "sufficient to sustain a Hobbs Act violation" even if the fear is not "the consequence of a direct or implicit threat by the defendant." *United States* v. *Billups*, 692 F.2d 320, 330 (1982), cert. denied, 464 U.S. 820 (1983).

United States v. *Livingston*, 665 F.2d 1003, 1005 (11th Cir. 1982), is also distinguishable. There, the defendant offered to sell information about embezzlement that was occurring at a company. The Eleventh Circuit reversed the Hobbs Act conviction, because there was no evidence that the defendant was participating in the embezzlement, and there was no implied

threat that he or anyone else would continue the embezzlement unless a payment were made to him. In other words, unlike this case, *Livingston* did not involve a threat that the economic harm feared by the victim would continue if the victim did not pay the extortionist. See *United States* v. *Blanton*, 793 F.2d 1553, 1560 (11th Cir.) (distinguishing *Livingston* on the ground that the defendant in that case "merely offered to sell information about an on-going embezzlement perpetrated by others"), cert. denied, 479 U.S. 1021 (1986).[3]

2. Petitioner also suggests (Pet. 22) that the evidence was insufficient for a reasonable jury to find that he engaged in attempted extortion in violation of the Hobbs Act. The court of appeals properly rejected that fact-bound claim. Pet. App. A5. The evidence showed that petitioner believed that Lambert feared that a

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[3] Nor is the district court case cited by petitioner (Pet. 13-15) at odds with the court of appeals' decision below. In *United States* v. *Ruedlinger*, 990 F. Supp. 1295, 1301 (D. Kan. 1997) (emphasis added), the court noted that "[t]here is little question that the fear necessary for an extortion charge need *not* be the product of the defendant's action." The court added that "an extortion charge requires that the defendant must have the power to hurt the victim in economic terms or the victim must believe that the defendant has the power to hurt him in economic terms." *Ibid.* But the victim school districts in *Ruedlinger* could not have reasonably believed that the defendants had the power to affect them economically if the victims refused to buy insurance from the defendants. In contrast, the victim in the present case, Lambert, could reasonably have believed that petitioner had connections with the local prosecutor's office and thus could control Lambert's economic destiny if Lambert did not yield to petitioner's demand for money (*e.g.*, by preventing a misdemeanor plea agreement). See Pet. App. A3. In any event, there is no indication that the Tenth Circuit has adopted *Ruedlinger*'s interpretation of the Hobbs Act, and this Court does not sit to resolve conflicts with district court opinions.

felony conviction would shut down his business, and that petitioner knew of that fear and sought to exploit it "over and over" by inducing Lambert to pay him $20,000. *Id.* at A3. Moreover, the evidence showed that Lambert's fear of economic loss was reasonable. See *ibid*; Gov't C.A. Br. 14-19. There is, in short, no reason for further review of petitioner's Hobbs Act conviction in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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